Filed 5/15/12 In re Nicole J. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re NICOLE J., a Person Coming Under the Juvenile Court Law.	B235815 (Los Angeles County Super. Ct. No. CK86003)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.J., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Affirmed with directions.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

K.J. (father) and Nicole B. (mother) are the parents of K. (born July 2010) and triplets Nicole, Ni., and Na. (born Mar. 2011). Father appeals the juvenile court's findings and orders declaring his children dependents of the court and removing them from his custody. We affirm with directions.

FACTUAL AND PROCEDURAL HISTORY

I. Prior Child Welfare History

K. was born in July 2010. The day after K. was born, an emergency referral was made to the Los Angeles County Department of Children and Family Services (DCFS), alleging that both mother and child tested positive for cocaine. Mother admitted smoking cocaine four days before K.'s birth. K. was placed with a foster family on July 22, 2010.

After meeting with DCFS, mother and father agreed to participate in voluntary family reunification services. Mother agreed to participate in drug rehabilitation with random drug and alcohol testing and parenting education classes, and father agreed to submit to an on-demand drug and alcohol test. If father's on-demand test returned positive, he agreed to submit to four random drug tests. Both mother and father agreed to monitored visits.

Father tested positive for marijuana on July 22, 2010, and for cocaine and marijuana on August 12 and 26, 2010. He enrolled in a drug rehabilitation program in August 2010, but he did not actively participate and was dropped from the program on August 31, 2010. Mother also enrolled in a drug rehabilitation program in August 2010; she too was dropped from the program in September.

Mother told a children's social worker (CSW) that she had smoked marijuana "today" and last used cocaine two days earlier. She said she had maintained her sobriety for two months before relapsing to drug use. The CSW gave mother referrals to drug treatment and encouraged her to enter residential treatment because outpatient services had not met her needs.

On November 6, 2010, father told the CSW that he and mother had done nothing wrong and he would not do anything required by the voluntary plan.

On December 14, 2010, a neighbor told the CSW that she often saw mother and father leaving a "crack house" and getting high.

On January 4, 2011, father told a CSW that he had smoked marijuana that morning "to get him up and going" and had used cocaine the day before. He "apologized and stated that he doesn't mean to disrespect CSW by coming into the office high but he just needed it." He said he had decreased his cocaine usage to three times per week. He said that his longest period of sobriety had been five years earlier, for a period of two years. He currently had two active Proposition 36 drug diversion cases in two different courts, and reported that he had been incarcerated for 17 years and had completed drug treatment programs in the past. Records indicated that father has a lengthy criminal history dating back to 1990, and that he was convicted on September 17, 2009, and October 28, 2009, of felony possession of controlled substances. He was arrested for possession of controlled substances on March 25, 2010.

Because mother and father failed to make progress under their voluntary plan, DCFS filed a juvenile dependency petition on January 6, 2011. The petition alleged that K., then five months old, had been exposed in utero to cocaine (b-1); that mother had a history of substance abuse and was a current abuser of cocaine and marijuana (b-2); and that father had a 20-year history of substance abuse and was a current abuser of cocaine, marijuana, and alcohol (b-3). Parents' drug use was alleged to create a detrimental home environment and to place K. at risk of harm. On January 6, the juvenile court found there was a prima facie case for detaining K. and ordered him temporarily placed with DCFS.

On February 28, 2011, DCFS advised the court that it could not locate mother or father.

On March 2, 2011, the court held an adjudication hearing, which neither parent attended. The court sustained the allegations of paragraphs b-1, b-2, and b-3, found that K. was within the court's jurisdiction pursuant to Welfare and Institutions Code section

300, subdivision (b),[1] and found by clear and convincing evidence pursuant to section 361, subdivision (c), that there would be a substantial danger to K.'s physical health and safety and emotional well-being if he were returned home. The court ordered K. removed from mother's and father's care and custody transferred to DCFS. DCFS was ordered to provide mother and father with family reunification services.

II. The Present Petition

Nicole, Ni., and Na. were born in March 2011, at 27 weeks gestation, weighing two pounds each. Mother tested positive for marijuana and cocaine at the triplets' birth. The court ordered them removed from their parents' custody and placed with DCFS on April 12, 2011.

DCFS filed a juvenile dependency petition as to Nicole, Ni., and Na. on April 20, 2011. It alleged that Nicole and Ni. tested positive for cocaine exposure at birth (b-1); mother had a history of illegal drug use and was a current user of cocaine, endangering the children's physical health and safety (b-2); and father had a 20-year history of substance abuse, including cocaine, marijuana, and alcohol, and was a current user of cocaine and marijuana, which rendered him incapable of providing regular care for the triplets (b-3).

On April 20, 2011, the court found that DCFS had established a prima facie case for detaining the children and ordered them temporarily placed with DCFS. Mother and father were ordered to randomly drug test and were granted monitored visits with the children after they contacted DCFS. Neither parent appeared at the hearing.

DCFS filed a jurisdiction/disposition report on May 12, 2011. It stated that the triplets remained hospitalized in the Neonatal Intensive Care Unit at St. Francis Hospital. DCFS reported that it had attempted unsuccessfully to contact mother and father and their whereabouts remained unknown. Although the court had ordered on April 20 that mother

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[1] All further statutory references are to the Welfare and Institutions Code.

and father be permitted monitored visits with the children, neither parent had contacted DCFS for any visits.

On May 12, 2011, father filed a "Parental Notification of Indian Status," stating that he might have Indian ancestry (Choctaw tribe) through his father, for whom he provided a name and phone number. The same day, both mother and father appeared and denied the allegations of the petition.

On May 18, 2011, mother told the CSW she knew father was using cocaine and marijuana.

On May 31, 2011, a CSW spoke to paternal grandfather, who stated that he believed his paternal grandmother was a Choctaw Indian. DCFS apparently sent notice to the Choctaw tribes as to Nicole, but failed to notice the tribes as to Ni. and Na.

DCFS filed a supplemental report on June 13, 2011. It stated that mother admitted using cocaine and marijuana while pregnant with the triplets. She claimed to have stopped using drugs on April 15 when she moved into Lots of Hope. Father also admitted to drug use, and said his drug use had increased since he lost custody of K. He tested positive for marijuana on May 10, 2011, and for marijuana and alcohol on May 26, 2011. As of the date of the report, DCFS had not received any information from the tribes as to the children's possible Indian heritage.

On July 11, 2011, mother and DCFS signed a mediation agreement in which mother agreed to submit on count b-1 of the petition (children born drug-exposed), and DCFS agreed to dismiss count b-2 (mother's drug history). There was no agreement as to count b-3 (father's drug history).

The court held a jurisdictional and dispositional hearing on July 25, 2011. At the hearing, father's counsel asked the court to dismiss count b-3 of the petition, stating that there was no evidence that father currently used drugs. Counsel stated that although DCFS alleged use of cocaine, father's most recent positive cocaine test was nearly a year earlier. While counsel conceded that father had more recently tested positive for alcohol and marijuana, he argued that the children were not then living with father and there was no showing that father's marijuana use interfered with his judgment. Finally, counsel

asserted that a drug history was not jurisdictional where there was no nexus between father's drug use and current risk to the children.

After hearing argument, the court sustained counts b-1 and b-3 of the petition, and dismissed count b-2. It found that the triplets were within the court's jurisdiction pursuant to section 300, subdivision (b),[2] and it found pursuant to section 361, subdivision (c), that substantial danger existed to the physical health of the minors and there were no reasonable means to protect the minors without removing them from their parents' physical custody. The court ordered both parents to enroll in and complete drug rehabilitation with random testing, parent education, and individual counseling to address case issues and parental responsibilities.

Father appealed on August 25, 2011, from the court's jurisdictional and dispositional findings and orders made on July 25, 2011.

DISCUSSION

Father contends: (1) as to the triplets, the evidence is insufficient to support the jurisdictional findings alleged in count b-3; (2) the dispositional order removing the triplets from his custody must be reversed because the evidence is insufficient to support a finding under section 361, subdivision (c); and (3) as to all four children, the juvenile court erred in failing to ensure compliance under the notice requirements of the Indian

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[2] Section 300, subdivision (b) provides in relevant part that a child is within the jurisdiction of the juvenile court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

Child Welfare Act (ICWA) and failed to determine whether the remaining provisions of ICWA applied. We consider these issues below.

I. Standard of Review

"'The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.) 'Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300' at the jurisdiction hearing. (§ 355, subd. (a).) 'On appeal, the "substantial evidence" test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.]' (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.)

"Thus, 'we must uphold the court's [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. (*In re Monique T.* (1992) 2 Cal.App.4th 1372, 1378.) Substantial evidence is evidence that is reasonable, credible, and of solid value. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924)' (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.)" (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

II. There Is Sufficient Evidence to Support the Jurisdictional Findings as to Father

Father contends the evidence is insufficient to support the juvenile court's jurisdictional finding (b-3) that he "has a twenty year history of substance abuse, including cocaine, marijuana and alcohol, and is a current use[r] of cocaine and marijuana which renders the children's father incapable of providing regular care of the children. On 7/22/10, the father had a positive toxicology screen for marijuana. On 8/12/10 and 8/26/10, the father had positive toxicology screens for cocaine and marijuana. The children's sibling, [K.] (DOB: [7/2010])[,] is a current dependent of the Juvenile Court due to father's substance abuse. The children's father's substance abuse

endangers the children's physical health and safety and creates a detrimental home environment, placing the children at risk of physical harm and damage." Father contends that although there was evidence that he had used cocaine in the past, he had not tested positive for cocaine since August 2010, some 11 months before the jurisdictional hearing. Further, he says that although there was evidence that he used marijuana and alcohol in May 2011, there was no evidence that such use interfered with his judgment.

We begin by noting that father does not contest the sufficiency of the evidence to support the allegations in paragraph b-1 of the petition. When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, "the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence." (*In re Alexis E*. (2009) 171 Cal.App.4th 438, 451.) Thus, whether or not the allegations of paragraph b-3 are supported by substantial evidence, the court's exercise of jurisdiction over the triplets would be proper.

In any event, we agree with DCFS that substantial evidence supports the allegations of paragraph b-3. While father is correct that dependency jurisdiction depends on evidence of current risk of harm to a child, "past harmful conduct is relevant to the current risk of future . . . harm to a child." (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 1025.) In the present case, there was substantial evidence that father had been using illegal drugs for more than 20 years and repeatedly found himself unable to conquer his substance abuse. Father admitted to a CSW that he began experimenting with drugs more than 20 years earlier, when he was 16 years old. Father was convicted of possession of controlled substances in April and October 2006 and September and October 2009, and was arrested for possession of controlled substances on March 25, 2010. He tested positive for marijuana on July 22, 2010, and for cocaine and marijuana on August 12 and 26, 2010. He enrolled in a drug rehabilitation program in August 2010,

but did not actively participate and was dropped from the program on August 31. In December 2010, a neighbor reported that she frequently saw mother and father leaving a "crack house" and often saw mother and father getting high together. In January 2011, father told his CSW that he was continuing to use cocaine three times per week, had smoked marijuana that morning "to get him up and going," and had used cocaine the day before. In May 2011, mother told the CSW that she knew father was using cocaine and marijuana; the same month, father told the CSW that he had used cocaine and marijuana as recently as April 15, and tested positive for marijuana (on May 10, 2011), and for marijuana and alcohol (May 26, 2011). Given father's consistent drug use over a long period of time, including as recently as two months before the hearing, the court reasonably could have concluded that father continued to abuse drugs at the time of the jurisdictional hearing.

Father also contends that even if there was some evidence of current drug use, there was no evidence that his drug use interfered with his judgment or of a "current nexus" between his drug use and any current risk to his children. We do not agree. Section 300.2 provides that the purpose of the provisions in the Welfare and Institutions Code relating to dependent children is to provide protection for children being harmed or who are at risk of being harmed, and that "[t]he provision of a home environment *free from the negative effects of substance abuse* is a necessary condition for the safety, protection and physical and emotional well-being of the child." (Italics added.) Father has shown himself utterly unable to provide such a home environment for his children or in any way to put their needs ahead of his own. In 2010, father told DCFS that he would not do anything required by his voluntary case plan because he had done nothing wrong. Father continued to use drugs throughout 2010 and 2011—including using drugs while subject to mandatory drug testing and, by his own admission, smoking marijuana immediately before a meeting with his CSW because he "just needed it" to "get him up and going"—even though his drug use jeopardized his ability to regain custody of his children. In December 2010, father was evicted from the sober living facility where he and mother had been living because he repeatedly was observed high on cocaine. Father

and mother failed to make provisions for adequate food for themselves and often asked various CSW's and their children's caregivers for money and food. Between early December 2010 and May 2011, father failed to visit his children or maintain any contact with DCFS, and even during months when he had some contact with DCFS, he failed to show up for meetings or rushed through them, telling his social workers that he was busy and needed to be elsewhere.

Father's drug use and related inability to put the needs of his children ahead of his own was particularly significant because of the extremely young ages of his four children—at the time of the July 2011 hearing, K. was 12 months old and the triplets were four months old—and the fact that all four were born prematurely and drug exposed. K. had repeated urinary tract infections and, as of June 2011, needed two surgical procedures. Nicole had recently been released to foster care from the neonatal intensive care unit, but Ni. and Na. remained hospitalized due to reflux after eating. The care of four babies with special needs would present a challenge for any parent; father's continuing use of alcohol, marijuana, and cocaine creates a substantial risk that the children will suffer neglect or abuse under his care because he cannot provide regular care and supervision of the children. The juvenile court did not err in so concluding.

III. There Was Sufficient Evidence to Support the Dispositional Order

Section 361, subdivision (c)(1) provides: "A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [that] . . . [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. The fact that a minor has been adjudicated a dependent child of the court pursuant to subdivision (e) of Section 300 shall constitute prima facie evidence that the minor cannot be safely left in the physical custody of the parent or

guardian with whom the minor resided at the time of injury. The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent or guardian from the home. The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm."

Father contends that the dispositional order removing the triplets from father's custody should be reversed because the evidence is insufficient to support a finding under section 361, subdivision (c). For all the reasons discussed in the prior section, we disagree and conclude that substantial evidence supported a finding under section 361, subdivision (c)(1).

IV. Compliance With ICWA

Father contends that although he told DCFS that his four children might be Indian children within the meaning of ICWA, DCFS failed to provide sufficient proof that notice was sent for all four children and failed to submit any return receipts or responses from the tribes or the Bureau of Indian Affairs. Therefore, he urges that the juvenile court's jurisdictional and dispositional findings as to all four children must be reversed and the case remanded to assure compliance with ICWA. DCFS concedes that because it had not received return receipts at the time of the hearing, it was premature for the juvenile court to conduct the dispositional hearing. It contends, however, that this error does not require reversal of any finding or order.

We note as a preliminary matter that although father purports to raise ICWA challenges as to all four children, he appealed only from the dispositional and jurisdictional findings and order made on July 25, 2011. That hearing pertained solely to the triplets. K.'s status had been adjudicated on March 2, 2011, and thus father's notice of appeal was untimely as to K. The following discussion of ICWA notice thus pertains only to the triplets.

"Congress enacted ICWA in 1978 to protect Indian children and their tribes from the erosion of tribal ties and cultural heritage and to preserve future Indian generations. [Citations.] Because '"the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents"' [citation], a tribe has the right to intervene in a state court dependency proceeding at any time [citation]. This significant right, however, is meaningless unless the tribe is notified of the proceedings. [Citation.] 'Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies.'" (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.)

ICWA provides in relevant part: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).)

Effective 2007, the state Legislature enacted section 224 in accordance with ICWA. Section 224.2 similarly provides that if the court or social worker has reason to know that an Indian child is involved in a dependency proceeding, notice must be provided, by registered or certified mail with return receipt requested, to all tribes of which the child may be a member or eligible for membership, the director of the Bureau of Indian Affairs, and the Secretary of the Interior. (Subd. (a).) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing, and no proceeding, except for the detention hearing, shall be held until at least 10 days after receipt of notice. (§ 224.2, subds. (c) & (d).) "'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' (*In re Nikki R.*, *supra*, 106 Cal.App.4th at p. 848.)" (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1466.)

Courts interpreting the ICWA have held that "'"'"[t]o satisfy the notice provisions of the [ICWA] and to provide a proper record for the juvenile court and appellate courts, [a social service agency] should follow a two-step procedure. First, it should identify any possible tribal affiliations and send proper notice to those entities, return receipt requested. [Citation.] Second, [the agency] should provide to the juvenile court a copy of the notice sent and *the return receipt*, as well as any correspondence received from the Indian entity relevant to the minor's status.'" (*In re Asia L.* (2003) 107 Cal.App.4th 498, 507.)' (*In re Mary G.* (2007) 151 Cal.App.4th 184, 209, italics added.)" (*Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 266.)

In the present case, DCFS did not provide to the juvenile court a copy of any return receipts. Thus, the court erred in proceeding with the jurisdictional and dispositional hearing absent proof by return receipt that notice was received. (See *Tina L.*, *supra*, 163 Cal.App.4th at p. 267.)

Nonetheless, reversal on ICWA grounds is not warranted. "When it is shown that the court or department knew or had reason to know the child was an Indian child but failed to make an inquiry, we remand with instructions to ensure compliance with ICWA; however, in doing so, we do not reverse the jurisdictional or dispositional orders where there is not yet a sufficient showing that the child is, in fact, an Indian child within the meaning of ICWA. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199-200.)" (*In re Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467.) Rather, as in *Damian C.*, "[a]lthough we conclude the matter must be remanded with directions to the court to ensure ICWA compliance, we decline to reverse the jurisdictional and dispositional orders" because "[t]here is not yet a sufficient showing [the triplets are] Indian child[ren] within the meaning of ICWA." (178 Cal.App.4th at p. 199.) If after proper inquiry and notice a tribe determines the triplets are Indian children, the tribe, a parent or the triplets may petition the court to invalidate an action of placement in foster care or termination of parental rights upon a showing that such action violated any provision of ICWA. (*Id.* at pp. 199-200.)

DISPOSITION

The jurisdictional and dispositional orders are affirmed. The matter is remanded to the juvenile court with directions to instruct the DCFS to complete ICWA inquiry and notice. The court shall advise the parents that if children are determined to be Indian children within the meaning of ICWA, they have the right to petition the court to invalidate any action in violation of ICWA.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.